**Appeal No. 2005AP2315** **Cir. Ct. No. 2003CV1094**

**WISCONSIN COURT OF APPEALS**
**DISTRICT II**

---

**HOLLY LORNSON, INDIVIDUALLY, AND AS SUCCESSOR SPECIAL ADMINISTRATOR OF THE ESTATE OF JANICE M. SANDERS, AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JOSEPH D. SANDERS, AND KIM HOERTSCH, INDIVIDUALLY, AND AS SUCCESSOR SPECIAL ADMINISTRATOR OF THE ESTATE OF JANICE M. SANDERS, AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JOSEPH D. SANDERS,**

**PLAINTIFFS-APPELLANTS,**

**TOMMY THOMPSON SECRETARY, DEPARTMENT OF HEALTH & HUMAN SERVICES,**

**INVOLUNTARY-PLAINTIFF,**

**V.**

**NADEEM SIDDIQUI, M.D., PAUL MCAVOY, M.D., MATTHEW WILLIAMS, M.D., JAMES E. HAINE, M.D., JOHN E. ALMQUIST, M.D., FREDERICK W. KNOCH, M.D., AFFINITY MEDICAL GROUP/AFFINITY HEALTH SYSTEM, ST. ELIZABETH HOSPITAL, INC., THE MEDICAL PROTECTIVE COMPANY, PREFERRED PROFESSIONAL INSURANCE COMPANY, AND WISCONSIN PATIENTS COMPENSATION FUND,**

**DEFENDANTS-RESPONDENTS.**

**FILED**

**MAY 17, 2006**

Cornelia G. Clark
Clerk of Supreme Court

---

## CERTIFICATION BY WISCONSIN COURT OF APPEALS

---

Before Brown, Nettesheim and Anderson, JJ.

Pursuant to WIS. STAT. RULE 809.61 this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

## ISSUE

In light of ***Rineck v. Johnson***, 155 Wis. 2d 659, 456 N.W.2d 336 (1990), and ***Storm v. Legion Insurance Co.***, 2003 WI 120, 265 Wis. 2d 169, 665 N.W.2d 353, two cases discussing the exclusivity of WIS. STAT. ch. 655 (2003-04),[1] does a surviving spouse's wrongful death claim in a medical malpractice action survive his or her own death such that his or her personal representatives have standing to pursue that claim?

## FACTS

This is a medical malpractice action arising out of Janice M. Sanders' October 2002 death. In October 2003, Janice's husband, Joseph D. Sanders, filed a complaint personally and as a special administrator of Janice's estate. Joseph asserted a claim on behalf of the estate to recover damages for Janice's conscious pain and suffering prior to her death. Joseph, acting on his own behalf, asserted a wrongful death claim to recover damages for loss of society and companionship and services of pecuniary value. In April 2005, Joseph unexpectedly died. Joseph and Janice's surviving daughters, Holly Lornson and Kim Hoertsch, were appointed personal representatives of their father's estate and successor special administrators of their mother's estate.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

In May 2005, Lornson and Hoertsch, acting individually and in their capacities as successor special administrators and personal representatives, filed a supplemental complaint. They reasserted all previously stated claims, including Joseph's wrongful death claim. Lornson and Hoertsch alleged that Joseph's wrongful death claim survived his death, and they had standing to assert this claim as personal representatives of his estate. The defendants filed motions to dismiss the wrongful death claim. The trial court granted the motions to dismiss. The court reasoned that WIS. STAT. § 655.007 does not list spouse's representatives among potential claimants in a medical malpractice action.

DISCUSSION

This case affords the supreme court an opportunity to address whether, in the context of a medical malpractice action, a surviving spouse's wrongful death claim survives his or her own death and therefore may be pursued by his or her personal representatives—an important issue of first impression in Wisconsin. Its resolution requires the interpretation and application of WIS. STAT. ch. 655, which governs medical malpractice actions, and the reconciliation of a divergent body of case law concerning the exclusivity of that chapter.

We begin by setting forth the relevant statutory provisions. WISCONSIN STAT. § 655.007 sets forth the class of individual plaintiffs subject to WIS. STAT. ch. 655. Section 655.007 provides: "[A]ny patient or the patient's representative having a claim or any spouse, parent, minor sibling or child of the patient having a derivative claim for injury or death on account of malpractice is subject to this chapter." Thus, § 655.007, by its terms, does not include spouses' representatives within its classification of claimants. Chapter 655 does not contain a specific survival provision for wrongful death claims. However, WIS. STAT.

§ 895.01(1)(o) provides for the survival of "[c]auses of action for wrongful death, which shall survive the death of the wrongdoer whether or not the death of the wrongdoer occurred before or after the death of the injured person."

Having set forth the relevant statutory provisions, we turn to the parties' suggested interpretations and applications. The defendants assert that WIS. STAT. ch. 655 controls all claims for death or injury resulting from medical malpractice and therefore WIS. STAT. § 895.01 does not apply. The defendants argue that WIS. STAT. § 655.007 limits the classification of claimants entitled to bring a claim for medical malpractice. Because § 655.007 does not refer to spouses' representatives as a class of claimants, the defendants maintain Lornson and Hoertsch lack standing to bring the wrongful death claim on behalf of Joseph's estate.

The defendants' position finds support in case law. In ***Rineck***,[2] the supreme court concluded that the limit on damages for society and companionship found in the wrongful death statute, WIS. STAT. § 895.04(4), did not apply to medical malpractice actions. ***Rineck***, 155 Wis. 2d at 668. The court explained that WIS. STAT. ch. 655 establishes an exclusive procedure for the prosecution of malpractice claims against a healthcare provider. ***Rineck*** 155 Wis. 2d at 665. According to the ***Rineck*** court, "Chapter 655 sets tort claims produced by medical malpractice apart from other tort claims, and parties are conclusively presumed to be bound by the provisions of the chapter regardless of injury or death." ***Rineck***, 155 Wis. 2d at 665. Most notably, the court said:

---

[2] We note that ***Rineck v. Johnson***, 155 Wis. 2d 659, 456 N.W.2d 336 (1990), was overruled on other grounds by ***Chang v. State Farm Mutual Automobile Insurance Co.***, 182 Wis. 2d 549, 566, 514 N.W.2d 399 (1994).

> Chapter 655 incorporates by specific reference certain other statutes which the legislature intended to apply in medical malpractice actions…. We do not believe that the legislature would have taken pains to specifically refer to particular statutes such as these if it intended to incorporate without mention other miscellaneous general provisions, such as sec. 895.04(4).

***Rineck***, 155 Wis. 2d at 666-67.

Then, in ***Dziadosz v. Zirneski***, 177 Wis. 2d 59, 62-63, 501 N.W.2d 828 (Ct. App. 1993), this court held that adult children could not make claims pursuant to WIS. STAT. § 895.04 for loss of society and companionship in medical malpractice cases. We rejected the adult children's argument that § 895.04 could apply so long as it did not conflict with WIS. STAT. ch. 655. ***Dziadosz***, 177 Wis. 2d at 63. We said:

> [W]e find nothing in the [***Rineck***] court's holding which indicates that statutory provisions outside of ch. 655 are applicable in medical malpractice actions on the condition that they do not conflict with ch. 655. The language of the court's holding in ***Rineck*** is clear and concise: Chapter 655 governing medical malpractice actions precludes from application those statutory provisions not expressly referred to in that chapter.

***Dziadosz***, 177 Wis. 2d at 63. The supreme court later reaffirmed ***Rineck*** in ***Jelinek v. St. Paul Fire & Casualty Insurance Co.***, 182 Wis. 2d 1, 9, 512 N.W.2d 764 (1994), *superceded by statute as stated in* ***Czapinski v. St. Francis Hosp., Inc.***, 2000 WI 80, ¶16, 236 Wis. 2d 316, 613 N.W.2d 120.

In a similar vein, in ***Czapinski***, 236 Wis. 2d 316, ¶13, the supreme court held that WIS. STAT. § 893.55(4)(f) did not expand the classification of claimants entitled to recover for loss of society and companionship in the wrongful death of a parent caused by medical malpractice to include adult children. The court explained that the classification of claimants entitled to bring a wrongful

death suit for medical malpractice is limited to those enumerated in WIS. STAT. § 655.007 and legislative history showed the adult children were not intended to be included within that classification. ***Czapinski***, 236 Wis. 2d 316, ¶2.

Lornson and Hoertsch, on the other hand, argue that although WIS. STAT. § 655.007 fails to list spouses' representatives in its classification of medical malpractice claimants, the list is not exclusive. Lornson and Hoertsch explain that Joseph, as the surviving spouse, undisputedly had a right to file a wrongful death claim pursuant to the plain language of § 655.007. They point out that WIS. STAT. ch. 655 does not contain a survival provision and then direct us to WIS. STAT. § 895.01(1)(o), which they claim "provides that *all* causes of action for wrongful death survive death."[3] They maintain that because no provision in ch. 655 conflicts with § 895.01(1)(o), the latter controls.

As with the defendants, Lornson and Hoertsch's position finds support in case law. In ***Estate of Wells v. Mount Sinai Medical Center***, 183 Wis. 2d 667, 670, 515 N.W.2d 705 (1994), the supreme court concluded that a parent could not recover for loss of the society and companionship of an adult child whose injuries allegedly resulted from medical malpractice. Because ***Wells*** was a medical malpractice action, the provisions of WIS. STAT. ch. 655 would seem to be applicable. However, the court stated:

> Because petitioner alleges that Wells's injuries resulted from medical malpractice, her loss of society and companionship claim is governed by [WIS. STAT. ch. 655]. Unfortunately, Chapter 655 is silent with respect to who can maintain such a claim, and under what conditions.

[3] Should the supreme court adopt Lornson and Hoertsch's position, the court will face the interesting question of whether WIS. STAT. § 895.01(1)(o) provides that the wrongful death claim survives only the death of the wrongdoer and not the death of the claimant.

> ….
>
> This lack of statutory guidance does not, however, prevent this court from acting. As we explained in [***Shockley v. Prier***, 66 Wis. 2d 394, 225 N.W.2d 495 (1975)], the rules against recovery for loss of society and companionship were created by the courts, and it is our responsibility, as much as it is the legislature's, to continue to shape this area of the law.

***Wells***, 183 Wis. 2d at 674 (citation and footnote omitted).

Later, in ***Hoffman v. Memorial Hospital of Iowa County***, 196 Wis. 2d 505, 513, 538 N.W.2d 627 (Ct. App. 1995), we discussed the difficulty of reconciling ***Dziadosz***'s view of ***Rineck*** with ***Wells***. We wrote that had the supreme court in ***Wells*** interpreted ***Rineck*** as it did in ***Jelinek***, and as this court did in ***Dziadosz***, it would have concluded that the legislature's silence in WIS. STAT. ch. 655 on the question of recovery for injury to adult children meant that the legislature intended that the plaintiff could not recover. ***Hoffman***, 196 Wis. 2d at 512-13. We determined that the ***Wells*** court did not choose that avenue but rather reasoned that the legislature's silence in ch. 655 did not prevent the court from acting. ***Hoffman***, 196 Wis. 2d at 513. Based, in part, on this understanding of ***Wells***, we wrote: "If we accept the view that [ch. 655] is self-contained, subject to no outside rules of practice and procedure, there would be no discovery, summary judgment, or amendment of pleadings in medical malpractice cases because ch. 655 does not mention these procedures." *See* ***Hoffman***, 196 Wis. 2d at 514.

The supreme court seemingly followed this understanding of WIS. STAT. ch. 655 in the more recent case, ***Storm***. There, the supreme court rejected a healthcare provider's argument that WIS. STAT. § 893.16 should have no application to medical malpractice actions because the statute was not specifically

referenced in WIS. STAT. ch. 655. ***Storm***, 265 Wis. 2d 169, ¶33. The court commented that the healthcare provider overstated the exclusivity of ch. 655:

> [WISCONSIN STAT.] Chapter 655 is not exclusive in the sense that it is a *comprehensive* set of procedural rules for medical malpractice claims. Numerous statutes, including civil procedure and discovery statutes, that are not located in Chapter 655 apply to claims brought for medical malpractice. *See* [***Hoffman***, 196 Wis. 2d at 513-14]. As one example, rules governing the service of a summons under [WIS. STAT.] § 801.02 apply to medical malpractice tort claims as they do to other civil actions. In addition, the limitations periods in [WIS. STAT.] § 893.55(1)-(3) are nowhere mentioned or expressly incorporated by reference in Chapter 655. Section 893.55 supplements the procedures prescribed by Chapter 655.
>
> The cases that [the healthcare provider] cites to support his exclusivity argument deal with issues of damages, which are matters that [WIS. STAT.] Chapter 655 and [WIS. STAT.] § 893.55 have expressly addressed by modifying the common law or other statutory law. For example, in [***Rineck***] we stated that Chapter 655 "*modif[ies]* general civil law in instances where [it] speak[s] to a given subject." ***Rineck***, 155 Wis. 2d at 665. The court noted that Chapter 655 "expressly delineates the damages limitation imposed in medical malpractice actions," ***id.***, superseding the more-restrictive limits found in Wisconsin's general wrongful death statute. ***Rineck*** stands for the proposition that if general statutory provisions *conflict with* Chapter 655, the latter will trump the general statute. Neither § 893.55 nor Chapter 655 includes any *tolling* provision that conflicts with [WIS. STAT.] § 893.16.

***Storm***, 265 Wis. 2d 169, ¶¶34-35 (footnote omitted).

Like the ***Hoffman*** court, we struggle to reconcile the language in ***Rineck*** and its progeny suggesting that WIS. STAT. ch. 655 exclusively governs medical malpractice actions and precludes from application those statutory provisions not expressly referred to in that chapter with the subsequent cases like ***Storm*** suggesting that ch. 655 is not self-contained and only controls where its provisions actually *conflict* with the general statutory provisions. A close reading

of the cases suggests that perhaps ***Rineck*** stands for the proposition that ch. 655 controls on questions of procedure, but that, under ***Storm***, ch. 655 does not govern questions of substance on which it is silent. *See* ***Finnegan v. Wisconsin Patients Comp. Fund***, 2003 WI 98, ¶28, 263 Wis. 2d 574, 666 N.W.2d 797 (citing ***Rineck*** and ***Czapinski***, and other cases for the following proposition, "It is now firmly established that Chapter 655 constitutes the *exclusive procedure* and remedy for medical malpractice in Wisconsin." (Emphasis added.)). However, it is not clear to us whether the question presented in this case, which at its core is a question of standing to pursue medical malpractice claims, is one of procedure governed by ***Rineck*** or is one of substance governed by ***Storm***.

## CONCLUSION

The foregoing discussion demonstrates the conflicting case law concerning the exclusivity of WIS. STAT. ch. 655. The reconciliation of the case law and its application to the question presented in this case is best left to the sound judgment of the supreme court as the law-defining and law-declaring court. The court's resolution of this case will provide more definitive guidance to the bench and bar as each attempts to discern the legislature's intended distinctions between medical malpractice actions and other tort claims. Accordingly, we respectfully ask the supreme court to accept jurisdiction over this appeal.